Supreme Court, U.S.
FILED
FEB 15 1995
CLERK

No. 94-1283

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
RICHARD BAUMAN, ROBERT GARSIDE,
RICHARD REYNOLDS, ELLSWORTH WALKER,
JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROLF G. ASPHAUG, ESQ.
(Counsel of Record)
1600 Blake Street
Denver, CO 80202
Telephone: 303/299-2203
Attorney for Respondents

February 15, 1995

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the District Court's stay orders of February 16, 1994 and June 17, 1994 were subject to interlocutory appeal under 28 U.S.C. § 1292(a)(1).

2. If the stay orders were subject to interlocutory appeal, whether the stay orders were an abuse of discretion.

LIST OF PARTIES

The parties to the proceedings below were petitioners James Edward Qualls and his attorney David L. Smith, and respondents Regional Transportation District ("RTD"), Richard Bauman, Robert Garside, Richard Reynolds, Ellsworth Walker and James Misek.

Petitioner Qualls was the sole appellant in *Qualls v. Regional Transp. Dist.,* No. 94-1127 (10th Cir. Sept. 14, 1994; Oct. 17, 1994). Petitioners Qualls and Smith were both appellants in *Qualls v. Regional Transp. Dist.,* No. 94-1314 (10th Cir. Jan. 5, 1995).

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	3
Argument	4
I. The Issue is Moot	4
II. A Stay is not an Appealable Injunction	4
III. The District Court did not Abuse its Discretion	7
IV. Petitioners Should Pay Damages and Double Costs for Filing a Frivolous Petition	7
Conclusion	8
Appendix	

TABLE OF AUTHORITIES

PAGE

Cases Cited:

Casillan v. Regional Transp. Dist., No. 92-1009 (10th Cir. Jan. 15, 1993) 8

Federal Land Bank of Spokane v. L.R. Ranch Co., 926 F.2d 859 (9th Cir. 1991) 6

Frutiger v. Hamilton Cent. School Dist., 928 F.2d 68 (2d Cir. 1991) 6

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 3, 5

Hamilton v. Robertson, 854 F.2d 740 (5th Cir. 1988) . 5

In re David L. Smith, 10 F.3d 723 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 53 (1994) . . . 2

Lunde v. Helms, 898 F.2d 1343 (8th Cir.), *cert. denied*, 498 U.S. 897 (1990) 7

Mai Basic Four, Inc. v. Basis, Inc., 962 F.2d 978 (10th Cir. 1992) 6

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 7

Pepper v. Miani, 734 F.2d 1420 (10th Cir. 1984) 6

Pollard v. United States, 352 U.S. 354 (1957) 4

Schall v. Joyce, 885 F.2d 101 (3d Cir. 1989) 7

Switzerland Cheese Ass'n v. E. Horne's Market, 385 U.S. 23 (1966) 6

Tri-State Generation and Transmission Ass'n v. Shoshone River Power, Inc., 874 F.2d 1346 (10th Cir. 1989) 6

	PAGE
Statutes Cited:	
28 U.S.C. § 1292(a)(1)	3, 5, 6
Other Authorities Cited:	
Sup. Ct. R. 10.1	3, 6
Sup. Ct. R. 15.1	8
Sup. Ct. R. 15.3	2
Sup. Ct. R. 24.1(g)	1
Sup. Ct. R. 42.2	4, 8

No. 94-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
RICHARD BAUMAN, ROBERT GARSIDE,
RICHARD REYNOLDS, ELLSWORTH WALKER,
JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioners are asking this Court to vacate a temporary stay of District Court proceedings that was *already* vacated by the District Court over four months ago.

Petitioners' statement of the case contains numerous misrepresentations and statements not "material to the consideration of the questions presented." Sup. Ct. R. 24.1(g). Pursuant to

Astonishingly, instead of responding to the Tenth Circuit's opinion and attempting to distinguish *Gulfstream* and the other cases cited therein, petitioners have merely copied in their petition to this Court — virtually *word for word* — their unsuccessful jurisdictional argument before the Tenth Circuit.

Third and finally, petitioners' claim that the District Court stay orders were "unconstitutional" abuses of discretion is as frivolous as their claim regarding appellate jurisdiction. *See* Petition at 20-23. None of the cases cited by petitioners is remotely on point. The District Court exercised appropriate discretion in imposing a temporary stay pending resolution of Smith's status to practice before the District Court.

Due to the utterly frivolous and harassing nature of the petition, respondents request an award of just damages and double costs against both petitioners as authorized by Sup. Ct. R. 42.2. Respondents are today filing a motion for such relief.

ARGUMENT

I. The Issue is Moot.

The issue for which certiorari review is sought is patently moot, and the petition is therefore frivolous. Petitioners are asking this Court to force the Tenth Circuit to review a stay already vacated by the District Court over four months ago.

"[R]eview in this Court will be allowed only where its judgment will have some material effect." *Pollard v. United States*, 352 U.S. 354, 358 (1957). In this case, even if interlocutory appeal were available and petitioners could somehow succeed on the merits, review in this Court would have absolutely no material effect.

II. A Stay is not an Appealable Injunction

It is well settled — in opinions of this Court, the Tenth Circuit, and other circuits — that a party cannot seek interlocutory appellate review of a temporary pretrial stay of proceedings

by characterizing the stay as an appealable "injunction" under 28 U.S.C. § 1292(a)(1).

This Court's ruling in *Gulfstream, supra,* is dispositive. Petitioners have not even attempted to explain how the Tenth Circuit possibly erred in citing *Gulfstream* in support of the conclusion that the stay was not an appealable injunction.

Petitioners' failure to address *Gulfstream* is perhaps not surprising, considering that their argument before this Court is, incredibly, nothing more than a *copy* of petitioners' previously unsuccessful argument before the Tenth Circuit. [2] That petitioners are presenting this Court with merely a copy of their previously discredited argument before the Tenth Circuit is compelling evidence of the true mission of their petition: not to advance legitimate legal arguments, but merely to harass the respondents and the courts with frivolous filings.

Petitioners have also failed to acknowledge, let alone distinguish, a second case cited by the Tenth Circuit in dismissing the "injunction" argument (see Petitioners' Appendix at iv): *Hamilton v. Robertson*, 854 F.2d 740 (5th Cir. 1988). The Tenth Circuit concurred with the Fifth Circuit's recognition in *Hamilton* of

> a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled 'injunctions,' that control proceedings only in the court that issues the order. The latter are not appealable . . . .

854 F.2d at 741.

---

[2] *Compare* Opening Brief for Plaintiff-Appellant (Case No. 94-1127, May 2, 1994), at 13-14, reproduced at pages 4-5 of Respondents' Appendix; *and* Opening Brief for Plaintiff-Appellant James Edward Qualls and His Attorney, Appellant David L. Smith (Case No. 94-1314, Sept. 1, 1994), at 16-18, reproduced at pages 6-7 of Respondents' Appendix; *with* Petition at 16-19. With the exception of a few minor changes (mainly to reflect the different courts and stay orders involved), the contents of the jurisdiction argument in all three documents are virtually identical.

At page 18 of the petition, petitioners cite — as they did before the Tenth Circuit, without explanation — the case of *Mai Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978 (10th Cir. 1992) as apparent support for their position. In fact, as respondent RTD had already pointed out to petitioners before the Tenth Circuit, [3] *Mai Basic Four* contradicts rather than supports petitioners' argument: " 'Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1).' " 962 F.2d at 981, *quoting Switzerland Cheese Ass'n v. E. Horne's Market*, 385 U.S. 23, 25 (1966).

Petitioners have also quoted at length — again without explanation, just as in their Tenth Circuit filings — from *Tri-State Generation and Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346 (10th Cir. 1989). *See* Petition at 16-18. However, neither the *Tri-State* decision nor any of the opinions cited within that decision discussed whether a stay is an appealable injunction.

In appellate proceedings before the Tenth Circuit, respondent RTD advised petitioners of several other cases supporting the position that stay orders are not injunctions subject to interlocutory appeal. [4] *See Frutiger v. Hamilton Cent. School Dist.*, 928 F.2d 68, 72 (2d Cir. 1991); *Federal Land Bank of Spokane v. L.R. Ranch Co.*, 926 F.2d 859, 864 (9th Cir. 1991); *Pepper v. Miani*, 734 F.2d 1420, 1421-22 (10th Cir. 1984). Petitioners have failed to acknowledge or discuss any of these cases as well.

Indeed, petitioners have failed to present *any* rational argument as to why the Tenth Circuit's rulings merit review on certiorari by this Court. *See* Sup. Ct. R. 10.1.

---

[3] The portion of respondent's brief to the Tenth Circuit discussing *Mai Basic Four* is reproduced at pages 8-9 of Respondents' Appendix.

[4] *See* Respondents' Appendix at 8-9.

III. The District Court did not Abuse its Discretion

Petitioners' claim that the District Court's stay orders were somehow an unconstitutional abuse of discretion is as frivolous as petitioners' claim of appellate jurisdiction. The District Court had ample grounds temporarily to stay pretrial proceedings pending determination as to whether Smith was legally entitled to practice law.

This and other courts have repeatedly recognized the District Courts' broad, discretionary powers to stay proceedings in order to control their dockets and promote economical litigation. *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 10 n.11 (1983); *Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir.), *cert. denied*, 498 U.S. 897 (1990); *Schall v. Joyce*, 885 F.2d 101, 104 (3d Cir. 1989).

None of the cases cited by petitioners is remotely relevant to the propositions for which it is cited. None of those cases holds that a stay order is an unconstitutional infringement on a litigant's rights to petition for redress of grievances, to a jury trial, and to counsel. None of the cases holds that a stay order is unconstitutional punishment of an attorney, or interference with an attorney's alleged right to represent a client. Respondents are aware of no cases in support of these propositions.

IV. Petitioners Should Pay Damages and Double Costs for Filing a Frivolous Petition

In a previous case brought against respondent Regional Transportation District by petitioner Smith, the Tenth Circuit noted:

> Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts . . . . Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal

> proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.

Casillan v. Regional Transp. Dist., No. 92-1009 (10th Cir. Jan. 15, 1993).

As shown above, the petition in this case is utterly frivolous. Nevertheless, respondents could not merely ignore the petition. Pursuant to Sup. Ct. R. 15.1, respondents have had to expend substantial time and costs in preparing a brief in opposition to the petition while at the same time continuing to litigate the underlying case in District Court.

This is not the first time that petitioner Smith has burdened the courts and respondent Regional Transportation District with apparently frivolous filings. Sup. Ct. R. 42.2 exists precisely in order to deter frivolous petitions such as this, and respondents respectfully request that the rule be utilized to the fullest extent possible in this case. Respondents are today filing a motion seeking such relief.

CONCLUSION

For the reasons presented above, respondents request that the Court deny certiorari, hold the petition to be frivolous, and award respondents just damages and double costs against both petitioners.

Dated February 15, 1995.

Respectfully submitted,

ROLF G. ASPHAUG
(Counsel of Record)
1600 Blake Street
Denver, CO 80202
Telephone: 303/299-2203
Attorney for Respondents

No. 94-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES EDWARD QUALLS,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
RICHARD BAUMAN, ROBERT GARSIDE,
RICHARD REYNOLDS, ELLSWORTH WALKER,
JAMES MISEK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX TO
BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

ROLF G. ASPHAUG, ESQ.
(Counsel of Record)
1600 Blake Street
Denver, CO 80202
Telephone: 303/299-2203
Attorney for Respondents

February 15, 1995

INDEX

	PAGE
Order Issued by United States District Judge Zita L. Weinshienk in *Qualls v. Regional Transp. Dist.*, Case No. 91-Z-989, on February 16, 1994	1
Order Issued by United States District Judge Zita L. Weinshienk in *Qualls v. Regional Transp. Dist.*, Case No. 91-Z-989, on June 17, 1994	2
Order Issued by United States District Judge Zita L. Weinshienk in *Qualls v. Regional Transp. Dist.*, Case No. 921-Z-989, on October 11, 1994	3
Excerpts from Opening Brief for Plaintiff-Appellant in *Qualls v. Regional Transp. Dist.* (Tenth Circuit Case No. 94-1127, May 2, 1994)	4
Excerpts from Opening Brief for Plaintiff-Appellant James Edward Qualls and His Attorney, Appellant David L. Smith in *Qualls v. Regional Transp. Dist.* (Tenth Circuit Case No. 94-1314, Sept. 1, 1994)	6
Excerpts from Appellee RTD's Memorandum Brief on Jurisdictional Issue in *Qualls v. Regional Transp. Dist.* (Tenth Circuit Case No. 94-1314, August 2, 1994	8

IN THE
United States District Court for the District of Colorado

Civil Action No. 91-Z-989

James Edward Qualls,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants.

ORDER

The matter before the Court is Defendant RTD's Motion To Stay Proceedings And To Vacate Trial Setting. After careful consideration, the Court finds that this case should be stayed pending the Committee on Conduct's determination of plaintiff's counsel's status. Accordingly, it is

ORDERED that Defendant RTD's Motion To Stay Proceedings And To Vacate Trial Setting is granted. It is

FURTHER ORDERED that the trial date of April 25, 1994, is hereby vacated. It is

FURTHER ORDERED that, in view of Chief Magistrate Judge Donald E. Abram's Orders of January 25 and January 28, 1994, the hearing on defendant's motion for sanctions, set on March 10, 1994, is hereby vacated. It is

FURTHER ORDERED that this case is stayed pending the Committee On Conduct's determination of plaintiff's counsel's status. It is

FURTHER ORDERED that plaintiff shall notify the Court when a decision is made regarding plaintiff's counsel's status.

DATED at Denver, Colorado, this 16th day of February, 1994.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

IN THE

United States District Court for the District of Colorado

Civil Action No. 91-Z-989

James Edward Qualls,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants.

ORDER

The matter before the Court is plaintiff's Notice, filed May 10, 1994, informing the Court that the Committee on Conduct has made a recommendation concerning plaintiff's counsel's status. After reading the recommendation, the Court determines that this case should continue to be stayed pending final action by the United States District Court for the District of Colorado on the Committee's recommendation. Accordingly, it is

ORDERED that this case is stayed until final action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status. It is

FURTHER ORDERED that plaintiff shall notify the Court when such final action is taken by the District Court.

DATED at Denver, Colorado, this 17th day of June, 1994.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

IN THE

United States District Court for the District of Colorado

Civil Action No. 91-Z-989

James Edward Qualls,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants.

ORDER

Although final action on plaintiff's counsel's status has not yet been taken, it appears to be appropriate to vacate the stay on this case and to set it for trial. Accordingly, it is

ORDERED that the stay is vacated. It is

FURTHER ORDERED that this matter is set for trial to Court for five days commencing on Monday, October 23, 1995, at 10:30 a.m. in Courtroom C-502, United States Courthouse, 1929 Stout Street, Denver, Colorado.

DATED at Denver, Colorado, this 11th day of October, 1994.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

Excerpts from Opening Brief for Plaintiff-Appellant in *Qualls v. Regional Transportation District* (Tenth Circuit Case No. 94-1127, May 2, 1994)

(page 13, line 5, to page 14, line 26)

IV. ARGUMENT

A. THE ORDER BEING APPEALED IS AN APPEALABLE ORDER UNDER 28 § U.S.C. 1292(a)(1).

In *Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc.,* 874 F.2d 1346 (10th Cir. 1989), this Court said:

> We must first determine whether or not we have jurisdiction to hear this appeal and, if so, the scope of that jurisdiction. As a general rule, only final decisions of the district courts are appealable. 28 U.S.C. § 1291 (1982). A statutory exception to the finality rule is set forth in 28 U.S.C. § 1292(a)(1) (1982), which provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ."
>
> Tri-State and REA appeal the district court's order which expressly denies their request for a permanent injunction. Although the order is interlocutory, [footnote omitted] it is appealable under section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides us with jurisdiction to hear this appeal.
>
> We agree with the Eleventh Circuit in *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1471 (11th Cir. 1985), that an interlocutory order expressly granting or denying injunctive relief fits squarely within the plain language of section 1292(a)(1). Cases such as *Carson v. American Brands, Inc.,* 450 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981), and *Stringfellow v.*

> *Concerned Neighbors in Action*, 480 U.S. 370, 107 S.Ct. 1177, 1183-84, 94 L.Ed.2d 389 (1987), which require an additional showing that the interlocutory order might have a "serious, perhaps irreparable, consequence" and that the order can be "effectually challenged" only by immediate appeal, are inapposite. *Carson* and its progeny do not deal with interlocutory orders that explicitly deny or grant a motion for injunctive [*sic*] but with orders that have "the practical effect of refusing an injunction." *Carson*, 450 U.S. at 84, 101 S.Ct. at 996; see *I.A.M. National Pension Fund Benefit Plan A v. Cooper Industries, Inc.*, 789 F.2d 21, 24 n. 3 (D.C.Cir.) ("*Carson* does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1)."), *cert. denied*, 479 U.S. 971, 107 S.Ct. 473, 93 L.Ed.2d 417 (1986); 16 C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice and Procedure* § 3924 (1977 & Supp. 1987) [hereinafter Wright & Miller]. When an order, although not expressly denying or granting an injunction, has the practical effect of doing so, the *Carson* line of cases extends the coverage of section 1292(a)(1) and allows the order to be appealable under that section, but only if the additional requirements are satisfied.

Id. at 1351. *See also Mai Basic Four, Inc.* v. *Basis, Inc.*, 962 F.2d 978, 980-83 (10th Cir. 1992).

In the present case, Mr. Qualls appeals Judge Weinshienk's (February 16, 1994) Order which expressly grants Mr. Asphaug's and Ms. Wheeler's motion for a stay of the case "pending the Committee on Conduct's determination of plaintiff's counsel's status." Although the order is interlocutory, it grants injunctive relief and is therefore appealable under the plain language of section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides this Court with jurisdiction to hear this appeal.

Excerpts from Opening Brief for Plaintiff-Appellant James Edward Qualls and His Attorney, Appellant David L. Smith in *Qualls v. Regional Transportation District* (Tenth Circuit Case No. 94-1314, September 1, 1994)

(page 16, line 15, to page 18, line 3)

IV. ARGUMENT

A. JUDGE WEINSHIENK'S (JUNE 17, 1994) ORDER IS AN APPEALABLE ORDER UNDER 28 U.S.C. § 1292(a)(1).

In Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc., 874 F.2d 1346 (10th Cir. 1989), this Court held:

> We must first determine whether or not we have jurisdiction to hear this appeal and, if so, the scope of that jurisdiction. As a general rule, only final decisions of the district courts are appealable. 28 U.S.C. § 1291 (1982). A statutory exception to the finality rule is set forth in 28 U.S.C. § 1292(a)(1) (1982), which provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ."
>
> Tri-State and REA appeal the district court's order which expressly denies their request for a permanent injunction. Although the order is interlocutory, [footnote omitted] it is appealable under section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides us with jurisdiction to hear this appeal.
>
> We agree with the Eleventh Circuit in *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1471 (11th Cir. 1985), that an interlocutory order expressly granting or denying injunctive relief fits squarely within the plain language of section 1292(a)(1). Cases such as *Carson v. American Brands, Inc.,* 450 U.S. 79, 84, 101

> S.Ct. 993, 996, 67 L.Ed.2d 59 (1981), and *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 107 S.Ct. 1177, 1183-84, 94 L.Ed.2d 389 (1987), which require an additional showing that the interlocutory order might have a "serious, perhaps irreparable, consequence" and that the order can be "effectually challenged" only by immediate appeal, are inapposite. *Carson* and its progeny do not deal with interlocutory orders that explicitly deny or grant a motion for injunctive relief but with orders that have "the practical effect of refusing an injunction." *Carson,* 450 U.S. at 84, 101 S.Ct. at 996; *see I.A.M. National Pension Fund Benefit Plan A v. Cooper Industries, Inc.,* 789 F.2d 21, 24 n. 3 (D.C.Cir.) ("*Carson* does not apply to an order clearly granting or denying a specific request for injunctive relief; such orders are always appealable under § 1292(a)(1)."), *cert. denied,* 479 U.S. 971, 107 S.Ct. 473, 93 L.Ed.2d 417 (1986); 16 C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice and Procedure* § 3924 (1977 & Supp. 1987) [hereinafter Wright & Miller]. When an order, although not expressly denying or granting an injunction, has the practical effect of doing so, the *Carson* line of cases extends the coverage of section 1292(a)(1) and allows the order to be appealable under that section, but only if the additional requirements are satisfied.

Id. at 1351. *See also Mai Basic Four, Inc. v. Basis, Inc.,* 962 F.2d 978, 980-83 (10th Cir. 1992).

In the present case, Mr. Qualls and his attorney appealed Judge Weinshienk's (June 17, 1994) order, which expressly stayed Mr. Qualls' case "until final action is taken by the District Court on the Committee on Conduct's recommendation concerning plaintiff's counsel's status." Although the order is interlocutory, it grants injunctive relief and is therefore appealable under the plain language of section 1292(a)(1) and reviewable at this stage of the proceedings. Section 1292(a)(1) thus provides this Court with jurisdiction to hear this appeal.

Excerpts from Appellee RTD's Memorandum Brief on Jurisdictional Issue in *Qualls v. Regional Transportation District* (Tenth Circuit Case No. 94-1314, August 2, 1994)

(page 4, line 3, to page 5, line 12)

A. THE ORDER IS NOT APPEALABLE UNDER § 1292(A)(1)

Qualls' appeal is not from an injunction or other interlocutory order, and is therefore not appealable under 28 U.S.C. § 1292(a)(1). As this Court stated in *Mai Basic Four, Inc. v. Basis, Inc.,* 962 F.2d 978 (10th Cir. 1992):

> "Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)."

Id. at 981, *quoting Switzerland Cheese Ass'n v. E. Horne's Market, Inc.,* 385 U.S. 23, 25, 87 S.Ct. 193, 195, 17 L.Ed.2d 23 (1966).

It is well settled that interlocutory orders, such as Judge Weinshienk's latest order merely continuing a prior stay, are not appealable under § 1292(a)(1). Indeed, any argument to the contrary is frivolous. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 279, 108 S.Ct. 1133, 1138, 99 L.Ed.2d 296 (1988) (district court order staying or refusing to stay a case "ordinarily is not considered an injunction"); *Federal Land Bank of Spokane v. L.R. Ranch Co.,* 926 F.2d 859, 864 (9th Cir. 1991); *Pepper v. Miani,* 734 F.2d 1420, 1421-22 (10th Cir. 1984). *See also Frutiger v. Hamilton Central School District,* 928 F.2d 68, 72 (2d Cir. 1991) (citing *Pepper, supra,* and other cases for "well settled" and "well established" rules that orders granting continuances and stays are not injunctions appealable under § 1292(a)(1)).

In appeal No. 94-1127, Qualls and Smith cited *Mai Basic Four, supra,* and *Tri-State Generation & Transmission Association v. Shoshone River Power, Inc.,* 874 F.2d 1346 (10th Cir. 1989), for the proposition that the original stay order was immediately appealable. As RTD noted in its motion for sanctions in appeal No. 94-1127, neither of these cases pertained to orders granting a stay or vacating a trial setting, and *Mai Basic Four* actually contains dicta directly contrary to Qualls' and Smith's claims.